IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

TUESDAY, THE 28TH NOVEMBER 2006 / 7TH AGRAHAYANA 1928

WP(C).No. 19160 of 2004(E)

PETITIONER:

S.SREEKALA, U.P.S.A., CVKMHSS
EAST KALLADA, PRESENTLY DEPLOYED TO GOVT.U.P.S.
PARAVOOR AS A PROTECTED HAND.

BY ADV. SRI.P.SREEKUMAR
SRI.K.S.MANU (PUNUKKONNOOR)

RESPONDENTS:
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1. THE DIRECTOR OF PUBLIC INSTRUCTIONS,
THIRUVANANTHAPURAM.

2. THE DISTRICT EDUCATIONAL OFFICER, KOLLAM

3. THE MANAGER, C.V.K.M.H.S.S., EAST
KALLADA, KOLLAM.

BY ADV. SRI.S.ABDUL RAZZAK
G.P.SMT.M.R.SREELATHA

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 28/11/2006 ALONG WITH WPC NO. 34956 OF 2004 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.M.JOSEPH, J.

W.P.(C).NOs. 19160/05 & 34956/04

Dated this the 28th day of November,2006.

JUDGMENT

These writ petitions are connected. Hence they are disposed of through this common judgment.

W.P.C.No.19160/04 is filed seeking implementation of Ext.P3. He seeks appointment as H.S.A. (Natural Science). Third respondent is the manager. Manager has filed the other writ petition. The manager has in fact filed a revision petition against Ext.P4 order On the revision Ext.P8 order was passed by the Government. Exts.P4 and P8 are challenged by the manager.

Case in brief in W.P.C.No.19160/04 is as follows:

2. Petitioner was working as UPSA in the third respondent's school. She was declared as protected teacher consequent on division fall. But she was retained in the parent school till 18-06-03. She is eligible to be appointed as H.S.A (Natural Science). During academic year 2003-04, vacancies of H.S.A. arose. But without waiting for the fixation of the establishment, petitioner was ordered to be deployed as a protected hand in a Government school. Subsequently, she was relieved on 18-06-03. According to her, there remain the post of H.S.A. (Natural Science) and she was entitled to be promoted to the

said post under Rule 43 of Chapter XIV A of K.E.R. Ext.P1 is the staff fixation order. It shows that two posts of H.S.A. (Natural Science) is needed, but only one is available. According to her she ought to have been accommodated. But third respondent made three new appointments overlooking petitioner's claim. Petitioner filed Ext.P2 petition which was directed to be considered by this court. It is stated that DPI heard the petitioner and the manager and passed Ext.P3 order directing the manager to appoint the petitioner from the very beginning of the academic year. Ext.P6 is the order which is confirmed in Ext.P8 order in W.P.C.No.34956/04, which is challenged by the manager. According to the manager petitioner has no right to claim appointment to the post of H.S.A.. He submits that she was a protected hand during the years 2000-01 and 2001-02 and she was permitted to continue in the parent school on protection. It is his case that petitioner was not continuing against the sanctioned post. Ultimately she came to be relieved, according to the manager on 8-06-03 and it is pursuant to the order dated 01-06-03. Therefore according to him when the alleged vacancies arose in the cadre of H.S.A. petitioner was not in service, he points out. He would submit that in order to invoke Rule 43, a teacher must be in service in the lower cadre and if only she is qualified to be promoted, she can be considered for promotion under Rule 43. In the case of the petitioner pursuant to the order of deployment she was out of service from the parent school as on the date of occurrence of vacancy. Petitioner

would contend that in fact there were vacancies which were unfilled even during the year 2002-03. At that time, at any rate petitioner was available in the school and she should have been accommodated, she contends. But the manager submits that petitioner was only a protected teacher and the protected teacher cannot lay a claim under Rule 43 to the post of H.S.A.

3. Petitioner would rely on the order dated 28-06-02. The relevant portion of the same relied on by the petitioner reads as follows:

> "Protected teachers under various managements shall be appointed in the schools under the respective managements, against the existing/arising vacancies in the categories of HSA/UPSA/LPSA/Language teacher by protecting their salary in the original posts. They shall be absorbed in their original post as and then vacancies arise in those categories. Minimum subject requirement should be ensured while accommodating protected teachers in High Schools"

4. Petitioner also relies on the circular No.H2-95417/73 dated 06-02-74 of the DPI. The relevant portion of the same reads as follows:

> "In the case of Corporate management and individual managements having more than one school, the short vacancies of teachers exceeding two months but less than one school year may be allowed to be filled up by fresh appointments even if there protected teachers working in other schools under the same management. But the vacancies the duration of which is one school year or more should not be filled up by fresh appointments when there are protected teachers in the same category of in a different category but qualified for appointment to those vacancies in schools under the same management. In such vacancies the protected teachers should be absorbed."

5. Adv.Sri.Razzak, learned counsel for the manager submit that

this may not be correct in view of the rule 51A. He would submit that what is contemplated under the order is only that if a person is working as HSA in the parent school and he comes to be deployed in a lower category on protection and a vacancy arise in the parent school in the category lower than that in which she was originally working in the parent school, the protected teacher must be accommodated in the lower post with protection of pay and thereafter when a vacancy arise in the original post, she must be accommodated in the said original post. He would submit that the reverse position cannot be accepted in a case where a teacher is working as UPSA, she cannot claim a right to be appointed if a vacancy arises in the cadre of H.S.A. This he submits because as according to him, it will amount to the executive order overstepping the limits of the mandate of the statutory rule. He would submit that the right available to a 51A claimant prior to the amendment in the year 2005 was only to lay a claim to the very same category of post.

6. One of the contentions which is seen taken by the manager in the writ petition is the violation of the principles of natural justice. Ext.P8 order was passed without hearing the manager. It is pointed out that hearing was posted to 15-10-04. He received the notice only on 15-10-04 at 3:00 p.m., though hearing was at 11:00a.m. Manager addressed a communication vide Ext.P6 bringing this fact to the notice of the Government. It is pointed out that Ext.P8 order came to be passed without hearing him on 29-10-04.

7. I feel that the issues raised are not dealt with as such. It is not as if this is an individual case which falls for decision. A decision of this nature may have rather far reaching consequences. I feel that in such circumstances, the matter needs re-consideration by the Government after giving opportunity of hearing to the manager and the petitioner in W.P.(C)No. 19160/04. Therefore, Ext.P8 cannot be sustained for the reason that the manager was not heard. Accordingly, Ext.P8 in W.P.(C)No.34956/04 is quashed. There will be a direction to the first respondent to hear the petitioner in W.P.C.No.19160/04 and the manager of CVKM HSS, Kollam and take a decision in accordance with law within a period of two months from the date of receipt of a copy of this judgment. In view of the prayer in W.P.(C)No.19160/04 and relief granted in W.P.(C)No.34956/04, no relief can be granted in W.P.(C)No.19160/04.

8. The interim order passed in W.P.(C)No.19160/04 not to make appointment to the post of H.S.A. (Natural Science) will continue till a decision is taken by the Government.

K.M.JOSEPH.
JUDGE.

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